

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1257

To be argued by Sara Criscitelli

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

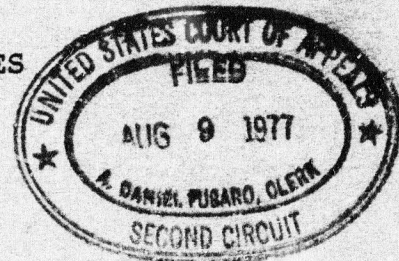
v.

RALPH EBOLI,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES



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IN THE UNITED STATES COURT OF APPEALS
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No. 77-1257

UNITED STATES OF AMERICA,
Appellee

v.

RALPH EBOLI,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

ISSUES PRESENTED

1. Whether appellant is entitled to appellate review of his claim that delay in executing an arrest warrant and alleged pre-accusation delay deprived him of his Fifth Amendment right to due process and Sixth Amendment right to a speedy trial, where he failed to present those claims to the district court, and whether there is in any event any merit to those claims.

2. Whether Rule 32(a)(1) and 32(c), Fed.R.Crim.P., which require a presentence report and an opportunity for allocution before sentence is imposed, apply to probation revocation proceedings.

STATUTES AND RULES INVOLVED

18 U.S.C. §3653 state in pertinent part:

At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed. As amended May 24, 1949, c.139, §56, 63 Stat. 96.

Rule 32 states in pertinent part:

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court.

(2) Notification of Right to Appeal. After imposing sentence in a case which was gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

* * *

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

* * *

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

(f) Revocation of Probation. The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the

grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

Amended Feb. 28, 1966, eff. July 1, 1966; April 24, 1972, eff. Oct. 1, 1972; April 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94-64, §3(31)-(34), 89 Stat. 375.

officer as directed (Tr. 12). He returned to New York in June 1974 to serve a previously imposed state sentence for assault and remained in state custody until January 1976 (Tr. 9).

From the time of his release until August 23, 1976, appellant never reported to his federal probation officer, Martin Morris, as directed, and only telephoned twice (Tr. 13, 14, 41, 42), despite visits by Morris to his home and to his son's business (Tr. 15, 33, 40), monthly letters from Morris, and frequent requests that appellant telephone him (Tr. 13-15, 33, 36, 37, 40, 41). As a result, on August 13, 1976, Morris charged appellant with a violation of probation, citing his failure to report during 1976. Judge Dooling issued a probation violator's warrant on August 27, 1976, and on or about January 26, 1977 appellant was arrested in Bethlehem, Pennsylvania. He was arraigned the following day and released on \$500 bond.

Appellant Eboli admitted that he had not reported to Morris (Tr. 18), but stated that his failure to do so was due to a misunderstanding as to what was expected of him. He had felt there was no urgent reason to report (Tr. 20, 21, 28) so long as he kept out of trouble and telephoned Morris occasionally (Tr. 16, 17).^{3/}

The court found that appellant had violated probation condition Number 7, by failing to report to the probation officer as

^{3/} Eboli also testified that he had telephoned Morris several times during the period and had spoken with him three or four times (Tr. 19).

directed (Tr. 46). The court accordingly revoked his probation and reinstated the original sentence of one year's imprisonment (Tr. 48). However, taking into account appellant's conduct following his release from state custody and the fact that he had apparently complied with the other terms of his probation (Tr. 48), the court suspended execution of 11 months of the sentence and placed appellant on probation for that period.

ARGUMENT

- I. APPELLANT IS NOT ENTITLED TO RAISE ON APPEAL CLAIMS OF ERROR WHICH WERE NOT PRESENTED TO THE COURT BELOW; IN ANY EVENT, THOSE CLAIMS ARE INSUBSTANTIAL.

Appellant contends that the six-month delay between issuance and execution of the arrest warrant for violation of his probation was unreasonable. He further contends that the delay between his first failure to report to his probation officer and the issuance of the arrest warrant for a probation violation was likewise unreasonable. However, appellant did not present these arguments to the district court and the record accordingly fails to reflect the reason for the delay at least with respect to execution of the warrant. Appellant would excuse this omission on his part by arguing that the defect is "jurisdictional" in effect (Br. at 9-10). Plainly this is not so.

Section 3653 of Title 18 clearly vests in the district court the power to issue an arrest warrant predicated upon a violation of a condition of probation "[a]t any time within the probation period, or within the maximum period permitted by" 18 U.S.C.

3651 (five years). The statute likewise directs that an individual arrested pursuant to such a warrant is to be taken before the court which has jurisdiction of him. With that condition met - that is, issuance of the warrant within five years from the commencement of the probationary term, the court "may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed." 18 U.S.C. 3653. Appellant's term of probation commenced on August 24, 1973 and the warrant was both issued (August 27, 1976) and executed (January 26, 1977) within five years of that date. This being the case, Section 3653 clearly accorded to the district court jurisdiction to revoke appellant's probation.

Appellant concedes that he failed to present to the district court the claims of error raised on this appeal. There is "no reason to depart from the general rule of practice which forecloses appellate consideration of issues not raised below."

Terkildsen v. Waters, 481 F.2d 201, 204 (2nd Cir., 1973).

"Adherence to the rule is particularly apt where, as here, factual questions [i.e., the reason for the delay] may have been implicated as to which the judge made no findings because the issue was not directly raised * * * ." Id. at 204-205.^{4/} Moreover, fore-

^{4/} Nor is appellant entitled to a remand, as he suggests (Br. at 10). He refers to the inadequacy of the record but this is entirely due to his failure to raise the claims now presented. There is thus no reason to accord him a remand to cure omissions in the record.

closure of appellate review is warranted even though appellant asserts that he was denied a right to a speedy trial and that he was denied due process of law as a consequence of pre-accusation delay. United States v. Scully, 415 F.2d 680, 682-683 (2nd Cir., 1969).

A. The Six Month Delay Between Issuance And Execution Of The Arrest Warrant Did Not Invalidate The Warrant Nor Did It Otherwise Affect The Validity Of The Probation Revocation.

Assuming, arguendo, that no justification exists for the delay between issuance and execution of the arrest warrant, appellant's claim is in any event insubstantial. The warrant issued four days after appellant's probationary term ended. It was not, however, executed until January 26, 1977. However, under the plain terms of the statute, the warrant could have been issued at this later point which was well within the five-year period permitted by Section 3653. In this respect, the provision operates much as a statute of limitations which provides "the primary guarantee against bringing overly stale criminal charges." United States v. Marion, 404 U.S. 307, 322. Since the warrant was issued and executed within the statutorily prescribed period, appellant has no ground for complaint.

It does not follow that a timely issued warrant may be executed at any time. As the court observed in United States v. Gernie, 228 F.Supp. 329 (S.D.N.Y., 1964), in assessing the impact of an eleven-year delay between timely issuance of a warrant and its execution, "Congress could not have intended a warrant to lie fallow indefinitely and to be executed at any time in the future

when it suited the probation authorities to do so. It court not have intended what might be in effect a lifetime probation." 228 F.Supp. at 338-339. Cf. Simon v. Mosely, 452 F.2d 306, 309 (10th Cir., 1971); Shelton v. Board of Parole, 388 F.2d 567 (D.C. Cir., 1967). Thus, while delay may be so excessive as to be presumptively prejudicial as in Gernie, ordinarily some prejudice must be shown. See United States ex rel. Blassingame v. Gengler, 502 F.2d 1388 (2nd Cir., 1974); United States ex rel. Buono v. Kenton, 287 F.2d 534 (2nd Cir., 1961), cert. denied, 368 U.S. 846;^{5/} United States ex rel. LiPuma v. Gengler, 411 F.Supp. 948, 951 (S.D.N.Y., 1976). See also McCowan v. Nelson, 436 F.2d 758, 761 (9th Cir., 1970).

Petitioner has made no showing of prejudice. To the contrary, the record reflects that he fully exercised his right to explain his persistent failure to report to his probation officer as he

^{5/} Both Buono and Blassingame stand for the proposition that unreasonable delay in affording a hearing on a parole violation after the parolee's arrest will not ordinarily defeat the revocation of parole if the parolee has been accorded a fair and effective hearing in any event. However, the holdings appear equally applicable in assessing the impact of delay here. While 18 U.S.C. 3653 mandates a hearing "[a]s speedily as possible after arrest" and cases assessing the impact of delay in the parole revocation context are accordingly inapplicable in determining whether that statutory requirement has been met [United States v. Companion, 545 F.2d 308, 310-311 (2nd Cir., 1976)]. Appellant's complaint is directed not at a failure to afford an immediate hearing after arrest but, rather, at the delay between issuance and execution of the arrest warrant. Thus, the requirement of a showing of prejudice appears at least as reasonable in this context as in the parole revocation context. This is especially true since delay in executing an arrest warrant does not, as a general proposition, affect the validity of the arrest. See, e.g., United States v. Wilson, 342 F.2d 782 (2nd Cir., 1965), cert. denied, 382 U.S. 860; Carlo v. United States, 286 F.2d 841, 846 (2nd Cir., 1961), cert. denied, 366 U.S. 944.

had agreed to do and as he was consistently requested to do. That record likewise reveals that his inability to offer a sufficient justification for his omission was due, not to the fact that his defense was hampered by the passage of time, but rather to the fact that no adequate explanation existed. Appellant was afforded a full and fair hearing before his probation was revoked. The delay of six months in execution of the warrant was not so excessive as to be presumptively prejudicial. Indeed, it was executed at a point when its issuance would have been entirely proper under the statute. In these circumstances, appellant - even if he is entitled to raise the point at this juncture - has no just cause for complaint.

As for appellant's invocation of his "speedy trial right" (Br. at 5), this Court had adopted the balancing test of Barker v. Wingo, 407 U.S. 514 (1972) in assessing the analogous claim that a defendant charged with probation violation was not accorded a hearing "[a]s speedily as possible after arrest," as required by 18 U.S.C. 3653. United States v. Companion, supra, 545 F.2d at 311. While certainly appellant's statutory right did not arise until he was actually arrested,^{6/} appellant's speedy trial claim fails even if the period of delay is assessed from the

^{6/} Appellant was arrested on January 26. He was arraigned and released on bond the following day. His probation revocation hearing was held fort-five days later on March 11. Since appellant did not present this claim below, the record offers no explanation for this period of delay. However, since appellant was only briefly incarcerated, suffered no prejudice as a result of the delay, and apparantly made no effort to secure a more prompt resolution of the matter, his statutory right was not abridged. United States v. Companion, supra.

point at which the arrest warrant issued.^{7/}

An assessment of the factors identified in Barker v. Wingo and considered in Companion do not support appellant's claim that his speedy trial right was abridged. The delay of somewhat less than seven months between issuance of the warrant and the revocation hearing was not long enough to be presumptively prejudicial. While the record does not of course reveal the reasons for the delay, it is clear, as we have shown, that appellant suffered no prejudice as a result. The delay did not result in significant incarceration before the hearing, nor did it hamper his ability to prepare a defense. Accordingly, no Sixth Amendment violation occurred.

B. There Was No Delay And Certainly No Unreasonable Delay In Charging Appellant With Having Violated A Condition Of His Probation.

Appellant also complains of the delay between his initial failure to report to the probation officer in March 1976 and the issuance of the arrest warrant in August 1976 (Br. at 6-7). He contends that the delay was unwarranted and that the delay - particularly when taken together with the subsequent delay between issuance of the warrant and his hearing - "disregarded due process."

Appellant's initial premise - that there was a significant and unwarranted period of preaccusation delay - is incorrect. It

^{7/} We note that the Eighth Circuit has held that the Sixth Amendment right to a speedy trial does not apply to probation revocation proceeding. Kartman v. Parrott, 535 F.2d 450, 455 (1976). However, the court did hold that the Due Process Clause assures the right to a prompt hearing. Id.

is clear from the record that appellant's probation was revoked not for a single violation of the terms of his probation but for a consistent course of conduct which continued until shortly before the warrant issued and which displayed an intentional and flagrant disregard of his obligation. Furthermore, as we pointed out previously, 18 U.S.C. 3653 provides a maximum period of five years within which to issue an arrest warrant predicated upon a probation violation. The statute thus serves the function of a statute of limitations which provides "the primary guarantee against bringing overly stale criminal charges." United States v. Marion, supra, 404 U.S. at 322. Finally, a showing of "actual prejudice" is the threshold requirement for a claim that preaccusation delay has resulted in a violation of due process. United States v. Lovasco, No. 75-1844, decided June 9, 1977, ___ U.S. ___, slip op. at p. 6. Appellant has neither claimed nor demonstrated prejudice, and as we have shown, the record reveals none. It is therefore clear that he is entitled to no relief on this ground.

In any event, we are constrained to point out that appellant's argument seriously misconstrues the function of probation and the duties of the probation officer. Here the delay in reporting appellant's initial failure to observe his conditions of probation was not unfair. To the contrary, the delay was clearly intended to benefit him by affording an opportunity to rectify his failure to report without resort to the sanction of probation revocation. Within the five month interval Morris made frequent efforts to contact appellant and to have appellant report to him. Morris

made numerous attempts to accomodate him and offered to meet with him closer to his home and at more convenient times. Since the purpose of probation is "to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official" (Roberts v. United States, 320 U.S. 264, 272), it would be contrary to those purposes and goals to require that every violation be immediately reported without first giving the defendant a chance to remedy it; it would also be contrary to the probation officer's function "to supervise a course of rehabilitation " if he were effectively divested of the broad discretion with respect to such determinations that is inherent in the nature of his responsibility. Gagnon v. Scarpelli, 411 U.S. 779, 784 (1973). Under these circumstances Morris acted properly in attempting to avoid charging defendant with failing to report as directed until it was clear that appellant did not intend to observe the conditions of his probation.

While we do not believe that the period between March and August 1976 constitutes preaccusation delay, even if that period represents a delay, it was entirely reasonable and can in no way contribute to the time period appellant relies upon in alleging that his constitutional rights were violated.

II. APPELLANT WAS NOT ENTITLED TO EITHER A PRESENTENCE REPORT OR AN OPPORTUNITY FOR ALLOCUTION WHEN HIS PROBATION WAS REVOKED AND THE ORIGINAL SUSPENDED SENTENCE REINSTATED.

Appellant contends that Rule 32(c) Fed.R.Crim.P. requires that upon revocation of probation the court must order preparation of a presentence report unless it specifically chooses not to so, with articulated findings on the record, or unless the presentence investigation is waived by the defendant; he also contends that under Rule 32(a)(1) the court must afford him an opportunity to make a statement and to present information in mitigation of punishment. Again, appellant made no such requests of the district court and should not be heard to complain of the matter on appeal. In any event, there is no merit to appellant's claim.

The plain language of Rule 32 provides no support for appellant's contention that it applies to probation revocation proceedings.^{8/} Moreover, this contention disregards the fundamental difference between a sentencing proceeding and a hearing at which probation is revoked and a defendant is ordered to serve the previously imposed sentence. In this case appellant was initially sentenced, upon his plea of guilty, to a year's imprisonment; execution of

^{8/} In United States v. Core, 532 F.2d 40, 42 (1976), on which appellant relies, the Seventh Circuit held that Rule 32(a)(1) requires an opportunity for allocution only when the original sentence is imposed. The court went on, however, to state that the "better practice" would be to afford such an opportunity on motion for reduction of sentence and at parole invocation hearings. The court, however, affirmed the judgment in that case without remand.

that sentence was suspended and he was placed on probation instead "Upon (its) revocation, without further court action, the original sentence remained for execution as though it had never been suspended." Roberts v. United States, supra, 320 U.S. at 267. Thus, "when the suspension of execution is revoked the original sentence becomes operative." Id. at 271 (Quoting 1939 Attorney General's Survey of Release Procedures, Vol. 1, p. 13).^{8/} The requirements of Rule 32 were fully observed when the court ordered a presentence report and granted the defendant an opportunity for allocution at the imposition of the sentence in 1973.^{9/} No more was required by the Rule.^{10/}

^{8/} The revocation procedure is accordingly unlike the deferred sentencing situation where the actual imposition of sentence is postponed. See United States v. Behrens, 375 U.S. 162 (1963).

^{9/} We are presuming that the district court observed the mandatory requirements of the rule as regards allocution. Appellant refers obliquely to the presentence prepared for use in sentencing him in 1973 (Br. at 10).

^{10/} We note that the court below indicated those facts which it possessed relative to appellant's conduct and stated that the only negative information concerned his probation violation. His favorable conduct notwithstanding, however, the court felt that appellant's flagrant disregard of a condition of his probation required a brief term of incarceration in order to impress upon him the importance of the probation and the need to take it seriously. Moreover, the purposes which underlie an opportunity for allocution were served by the hearing itself in this case. Appellant proffered an explanation for his failure to report and informed the court of his lawful activities over the past months; thus, though not in an allocution context, he was given an opportunity to speak in his behalf and to present factors in mitigation on subjects considered by the court in sentencing.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of conviction should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that copies of this Brief for the United states, Appellee were deposited in the United States mail, postage prepaid, addressed to each of the below-listed counsel of record.

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